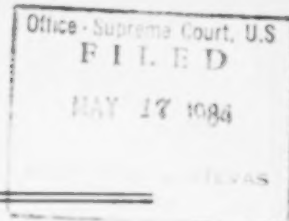


No. 83-1711



In the Supreme Court of the United States

October Term, 1983

ALBRECHT, INC., et al.,

Appellants,

vs.

VILLAGE OF HUDSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

MOTION TO DISMISS OR AFFIRM

CHARLES E. MERCHANT, *Counsel of Record*
K. J. MONTGOMERY

One Erieview Plaza
Suite 1101
Cleveland, Ohio 44114
(216) 621-1100

Attorneys for Appellee

QUESTIONS PRESENTED

Whether municipal ordinances that require owners of commercial property to secure approval of an architectural review board, as part of a building permit review process, prior to making any external architectural alterations is within the police power of the state and, therefore, not facially violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution when such ordinances provide adequate review and appeal procedures.

Whether it is within the police power of the states for a municipal legislative body to take aesthetics into consideration as one of the factors in enacting zoning legislation.

TABLE OF CONTENTS

Questions Presented	I
Motion to Dismiss or Affirm	1
Statement of Facts	1
This Appeal Should Be Dismissed As There Is No Substantial Federal Question Presented	3
The Judgment of the Ohio Supreme Court Should Be Affirmed	6
Conclusion	8

TABLE OF AUTHORITIES

Cases

<i>Berman v. Parker</i> , 348 U.S. 26 (1954)	4
<i>Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	4, 5
<i>Gorieb v. Fox</i> , 274 U.S. 603 (1927)	4
<i>Metro Media, Inc. v. San Diego</i> , 453 U.S. 490 (1981)	4
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978)	4
<i>State v. Jones</i> , 305 N.C. 520, 290 S.E.2d 675 (1982)	4

Constitution and Ordinance

United States Constitution, Fourteenth Amendment	I
Codified Ordinances of the Village of Hudson:	
Chapter 1204	1, 3
Section 1204.08	6

No. 83-1711

In the Supreme Court of the United States

October Term, 1983

ALBRECHT, INC., et al.,
Appellants,

vs.

VILLAGE OF HUDSON,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

MOTION TO DISMISS OR AFFIRM

Appellee respectfully moves this Court to dismiss the within appeal on the basis that there is no substantial federal question presented or, in the alternative, to affirm the judgment of the Ohio Supreme Court as a proper statement of the law with respect to the questions presented, on the basis of the brief submitted with respect to each motion.

STATEMENT OF FACTS

Appellee, Village of Hudson, is the owner of certain property acquired under an issue of industrial revenue bonds which is leased to appellant, Albrecht, Inc. ("Albrecht"), and upon which a shopping center, including Acme Store No. 4, is located.

Under Chapter 1204 of the ordinances of the Village of Hudson and as part of a building permit review process,

detailed building plans for new construction, alterations or additions to buildings are submitted to the Architectural and Historic Board of Review.

Appellant submitted to the Village a detailed set of plans in connection with the expansion, alteration and addition of the Acme Store No. 4, which plans detailed the work to be carried out on the east, south and west sides of the building. The submitted plans did not indicate that appellant intended any construction, alteration or addition on the north side of the store which is the street frontage of the building.

The plans relating to the east, south and west sides of the building were approved by the Building Inspector and the Architectural and Historic Board of Review in 1978.

Construction did not commence until late 1980 and early 1981 when appellant, during the course of construction, altered the facade of the north side of the building replacing certain windows with aggregate stone panels. Work continued on the north facade despite a stop work order issued by the Building Inspector and the Village of Hudson instituted an action in the Court of Common Pleas of Summit County, Ohio, requesting that the court enjoin the appellant from performing any further construction on Acme Store No. 4. Appellant filed a counterclaim requesting the court to determine and declare that the Hudson ordinances were unconstitutional.

As part of its defense, appellant relied on plans submitted to the State of Ohio Department of Industrial Relations, Division of Factory and Building Inspection, for the issuance of a State permit, which plans did portray certain work to be done on the north facade of the building.

Appellant, up to the present date, has never submitted any plan to the Village of Hudson for review for the work which was performed on the north facade of the store.

As noted in appellant's Jurisdictional Statement, the Court of Common Pleas, the Ohio Court of Appeals for the Ninth Judicial District, and the Supreme Court of Ohio each held that Chapter 1204 of the Codified Ordinances of the Village of Hudson was a valid exercise of the state's police power and, therefore, was not violative of the United States Constitution.

THIS APPEAL SHOULD BE DISMISSED AS THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

The appellant herein submitted the plans for the east, west and south facades to the Architectural and Historic Board of Review and did receive approval for such construction from the Architectural Board. Since the plans for the alterations of the north facade were never submitted to the Architectural Board, there has been no unconstitutional application of the ordinances imposed upon the appellant. Accordingly, any discussion of unconstitutionality is necessarily restricted to facial unconstitutionality of the ordinance.

Appellant complains, on page 14 of its Jurisdictional Statement, that the stated purpose of protecting real estate from impairment and destruction of value does not serve to move the ordinances at issue out of the realm of aesthetic regulation.

This Court has on many occasions recognized that the relationship between aesthetics and the public welfare is

such that the promotion of aesthetic values is a legitimate police power purpose. *See, Metro Media, Inc. v. San Diego*, 453 U.S. 490 (1981); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Berman v. Parker*, 348 U.S. 26 (1954); and *Gorieb v. Fox*, 274 U.S. 603 (1927).

The holding of the Ohio Supreme Court in this case merely reaffirms the proposition that the inclusion of aesthetics as one of the factors considered in the enactment of zoning legislation does not violate any United States constitutional provision.

While the appellant herein contends that this case represents Ohio's shift to the view that a state's police power does include the power to regulate land use based solely upon aesthetics, the reference to aesthetics herein was not considered by the Ohio Supreme Court as being determinative of the present zoning legislation.

In point of fact, the Ohio Supreme Court stated specifically that:

"Moreover, we find further that *the ordinance does not rest solely upon aesthetic considerations*. Rather, Section 1204.01 also reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value. We believe that these goals are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise." (9 Ohio St. 3d 73.) (Emphasis supplied.)

Many state courts have come to the conclusion that the promotion of aesthetics is a valid police purpose. *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982). The history of zoning itself indicates that zoning law is basically nothing more than an articulation of community taste. The limitations on this articulation were set forth in *Euclid v. Ambler*

Realty Co., 272 U.S. 365 (1926), where this Court stated at page 388, that:

"The question whether the power exists to forbid the erection of a building of a particular kind or for a particular use like the question of whether a particular thing is a nuisance is to be determined not by an abstract consideration of the building or the thing considered a part but by considering it in connection with the circumstances and locality . . . a nuisance may merely be a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

However, as in the *Euclid* case, the community must have the right to first make the determination and decision through its designated body as to whether or not their proposal comports with the standards or guidelines of the legislation. Without such initial review, there can be no determination of the particular proposal in connection with the circumstances and locality.

Due process requires some reasonable means of relief to prevent an arbitrary, capricious or unreasonable determination. In the present case, an appellate procedure is provided to the Village Zoning Board of Appeals and thence to the courts of the State to guard against arbitrary, discriminatory or unreasonable action which would constitute an abuse of discretion on the part of the body issuing the ruling.

The Ohio Supreme Court has also addressed the question of meaningful guidelines and found that the board is required to act in accordance with accepted and recognized architectural principles as well as other provisions of the Zoning Code and ordinances of the village. The standards to be followed which take into account the proposed structure's harmonious development with existing

buildings, as well as its reasonable integration with vehicular and pedestrian traffic patterns, are set forth in Section 1204.08 of the Code.

The ordinance herein, as noted by the Ohio Supreme Court, is entitled to a presumption of validity. Appellant raises no valid objection to the legislation on its face and presents no evidence of ill motive, arbitrariness or capriciousness in the adoption of this particular ordinance.

Accordingly, it is respectfully submitted that the within appeal presents no substantial federal question and, therefore, should be dismissed.

THE JUDGMENT OF THE OHIO SUPREME COURT SHOULD BE AFFIRMED.

The appellant proposes to present to this Court the facial validity of the municipal ordinance with a claimed lack of guidelines or standards in the legislation, which issues were squarely addressed and properly resolved by the Ohio Supreme Court. The Court found and stated at 9 Ohio St. 3d, page 74, that:

"In the present case, Section 1204.01 of the ordinance declares the broad policies to be advanced—the protection and preservation of the value, appearance and use of property; the maintenance of a high character of community development; and the protection of real estate from impairment or destruction of value. In order to accomplish this policy, the board is given authority to regulate various aspects of all structures to be built or modified. In exercising its authority, the board is to be guided by 'accepted and recognized architectural principles,' as well as other provisions of the zoning code and ordinances of the village. In particular, Section 1204.08 of the code lists other stan-

dards to be followed which take into account the proposed structure's harmonious development with existing buildings, as well as its reasonable integration with vehicular and pedestrian traffic patterns.

It is our view that these sections set forth all the standards reasonably necessary to guide the board in the exercise of its discretion and that, therefore, the ordinance does not constitute an unlawful delegation of legislative authority."

The question concerning the relationship of aesthetics to zoning regulations has been addressed and fully answered in the Motion to Dismiss herein. Additionally, the Ohio Supreme Court found and stated at 9 Ohio St. 3d 69, at page 73, that:

"Moreover, we further find that the ordinance does not rest solely upon aesthetic considerations. Rather, Section 1204.01 also reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value. We believe that these goals are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise.

Based upon the foregoing analysis, we must reject appellants' contention that the village zoning ordinance is not substantially related to the public health, safety and general welfare and is thus an invalid exercise of the local police power."

The sound reasoning of the Ohio State Supreme Court in holding that the ordinances of the Village of Hudson are valid and its decision in permitting aesthetics to be considered as one of the factors in enacting zoning legislation has a sound basis in reason as well as law. This Court should affirm the ruling of the Ohio Supreme Court.

CONCLUSION

Probable jurisdiction should be denied and the within appeal dismissed by this Court. In the alternative, this Court should affirm the judgment of the Ohio Supreme Court as being a proper articulation of the law with respect to the legitimacy of architectural boards of review.

Respectfully submitted,

CHARLES E. MERCHANT, *Counsel of Record*

K. J. MONTGOMERY

One Erieview Plaza

Suite 1101

Cleveland, Ohio 44114

(216) 621-1100

Attorneys for Appellee